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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGEL T. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

Z.L. et al.,

Defendants and Appellants.

D049849

(Super. Ct. No. EJ02385)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Temporary Judge. (Pursuant to Cal. Const., art. IV, § 21.) Affirmed.

Z.L. (Z.) appeals a judgment terminating her parental rights to her minor sons, Angel T. and Andrew L. (minors), under Welfare and Institutions Code section 366.26.¹ She contends the court erred by denying her section 388 petition for modification seeking to have the minors returned to her custody. Z. also challenges the sufficiency of the

evidence to support the court's findings that the beneficial parent-child relationship exception did not apply to preclude terminating parental rights under section 366.26, subdivision (c)(1)(A). E.R. (E.), Angel's father, also appeals and joins in Z.'s arguments concerning Angel.² We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2004 the San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivision (b) on behalf of three-year-old Angel. The petition alleged Angel had been exposed to violent confrontations in the home between Z. and E. The petition further alleged the conditions of Angel's home were unsafe and that Z. had left Angel home alone and unattended. According to the detention report, Z. left Angel in the middle of the night while she went to the hospital to visit her boyfriend who had been shot in a gang related incident. Angel was later found leaning out of a window that was unprotected by a window screen. He was screaming and crying out for Z. Z. denied abusing drugs but family members alluded to the possibility that she had. E. admitted to drug use and was recently released from prison after serving time for drug possession..

In March 2004 Z. and E. submitted on the petition, which the court sustained as amended. The court found a prima facie showing had been made on the allegations of the petition, detained Angel, and ordered Z. and E. to comply with their case plan. The court ordered Z. to submit to a psychological evaluation and participate in domestic

¹ Statutory references are to the Welfare and Institutions Code.

violence classes, counseling, and the Substance Abuse Recovery Management Systems (SARMS) program.

In August 2004 Agency filed a second petition under section 300, subdivision (b) on behalf of newborn Andrew. The petition alleged Andrew was at risk of suffering harm because Z. had tested positive for methamphetamines and was noncompliant with SARMS. The court made a prima facie finding on the petition, detained Andrew in out of home care and ordered Z. to comply with services.

The Agency's jurisdiction report for Andrew stated Z. started abusing drugs when she was 18 years old. Z. enrolled in the KIVA drug and alcohol program in July 2004. However, in September 2004, Z. left the KIVA program and when she returned, she admitted using drugs during her absence. E. did not participate in services and was terminated from SARMS for failure to comply with the program.

During the next six months, Z. made substantial progress with services. In March 2005 Angel and Andrew were placed in Z.'s custody at the KIVA center. The court continued the dependency for the minors, reunifications services, and scheduled a 12-month review hearing. By the next reporting period, Z. and the minors had moved into a sober living facility and Z. had secured employment. Z. completed a parenting program and attended counseling sessions. She also remained compliant with SARMS and continued to drug test negative. E., however, had not made progress with services and was serving time in prison.

2 E. is the presumed father of Angel.

In October 2005 Agency filed a section 387 petition recommending Andrew be removed from Z.'s custody. Z. asked to have Andrew removed from her care. She admitted she was overwhelmed with working, completing her case plan, and caring for Andrew because he required a lot of attention. Z. did not feel she was capable of handling the responsibilities facing her. She further admitted there were times she did not feel bonded to Andrew. The court detained Andrew and placed him with his maternal grandmother.

In December 2005 Agency subsequently filed a section 387 petition on behalf of Angel. The petition alleged Z.'s whereabouts were unknown and she had been removed from her sober living environment for several reasons, including that drug paraphernalia was discovered in her room. She also had been found with an adult male in her room against the facility's policy. Later that same month, Z. reentered KIVA to address her addiction. She told the social worker she had a sudden and newfound sincerity in reunifying with the minors. Z. was pregnant with her third child although she did not disclose the pregnancy to social workers. The paternity of the unborn child was unclear but E. had been released from prison and Z. admitted she still loved E. and was concerned for his well-being. The social worker recommended the court terminate services and set a selection and implementation hearing under section 366.26.

Before the section 366.26 hearing, Agency recommended the minors be removed from their maternal grandmother's custody and placed in licensed foster care. The maternal grandmother allowed Z. to have unsupervised overnight visits with Andrew in violation of a court order. Z. claimed the social worker had agreed to the visits. Z.

further claimed she had been clean since January 2006 but admitted she did not understand recovery. The court held a hearing and detained the minors with a nonrelative extended family member. The court terminated services and set a section 366.26 hearing.

The Agency later requested the court remove the minors to a new home with an approved adoptive home study. This family was willing to make a permanent home for the minors in addition to the minors' new brother, Anthony.

In July 2006 Z. filed a section 388 petition for modification seeking to have the minors returned to her or placed with her brother. As changed circumstances, Z. alleged she had been in the KIVA program since January 2006, was active with drug court, had 165 days of sobriety, and was in counseling. As to the minors' best interests, Z. alleged she had a bond with the minors and they would find stability if placed in her care.

In the section 366.26 assessment report, the minors were deemed adoptable because of their overall good health and lack of major developmental problems. The current caregivers had an approved home study and were committed to providing a permanent home for the minors. The minors appeared to be forming an attachment to the caregivers. The social worker believed the minors did not share a parent-child relationship with Z. that would outweigh the benefits of adoption. Andrew had been a dependent since birth and Angel became a dependent when he was three. The minors' infant sibling, Anthony, was also a dependent and recently was placed in the same home as Andrew and Angel. In the event the caregivers were unable to adopt the minors, there were 12 families with approved home studies interested in adopting the minors.

The social worker reported visits between the minors and Z. were generally appropriate. At the end of visits, however, the minors easily separated from Z. and did not show signs of adverse reactions in her absence. The social worker believed Z. would not be able to provide the minors with the stability they deserved and would be at risk if placed with Z. There was no indication Z. would be able to maintain sobriety. She entered the KIVA program in January 2006 but, according to counselors, she began actively participating in April 2006.

The court heard testimony concerning the section 388 petition over a four-day period. Claudia F., Z.'s therapist, testified Z. had taken full responsibility for her mistakes and attended therapy regularly. Claudia believed Z. had never been under the influence of drugs during counseling sessions. Claudia was concerned that Z. had not appeared in court to attend the hearing that day and believed there must be a serious reason for the failure to appear. Claudia further believed Z. was not as bonded to Andrew as she was to Angel. In situations where a parent is not attached to a child, it would affect the child's sense of security.

Z. testified on two separate occasions. In September 2006 Z. testified she had finished the KIVA program and was participating in drug court. She was employed full time and had achieved 251 days of sobriety. Z. remained committed to attending meetings and working with her sponsor on the steps to recovery. Z. visited the minors every week and she believed the visits went well.

In October 2006 Z. was scheduled to testify a second time but initially did not appear and her attorney did not know the reason for Z.'s absence. She eventually arrived

late. Z. testified she did not know if bonding issues remained with Andrew but stated her feelings for him had changed and she wanted to reunify with him. Z. remained employed but planned to work part time if the minors were in her care. For daycare, she planned to leave the minors with the maternal grandmother or at the YMCA. She admitted she had not contacted the YMCA to see if they had openings and did not know how much daycare would cost. Concerning her income, she planned to get child support to help care for the minors, in addition to her part time salary. At the conclusion of her testimony, the court suggested Z. submit to a voluntary drug test. Z. denied any recent drug activity but refused to submit to the test for personal reasons.

The court heard the social worker's testimony concerning the minors' placement. They were doing well and had become attached to the caregivers. The social worker believed the most stable placement for the minors was with the caregivers.

After considering the evidence, the court denied the section 388 petition, finding Z. had not shown changed circumstances. The court noted Z.'s behavior during her second day of testimony was of concern. She appeared disconnected and showed mannerisms consistent with drug use. The court found by clear and convincing evidence the minors were likely to be adopted if parental rights were terminated. The court found none of the exceptions to section 366.26, subdivision (c)(1) applied. The court terminated parental rights and referred the minors for adoptive placement.

DISCUSSION

I

Z. contends the court erred by denying her section 388 modification petition to have the minors returned to her custody. Z. asserts she showed circumstances had changed and returning the minors to her custody would serve in the minors' best interests.

A

Under section 388 a parent may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change in circumstances or new evidence, and the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Whether a previous order should be modified and a change would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) When two or more inferences reasonably can be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination.

When the court evaluates the appropriate placement for a child after reunification services have been terminated, its sole task is to determine the child's best interests. (*In re Stephanie M., supra*, 7 Cal.4th at p. 320.) In this context, the goal is to assure the

child "stability and continuity." (*Id.* at p. 317.) The need for stability and continuity " 'will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citation.]" (*Ibid.*) Thus, after the court terminates reunification services, "there is a rebuttable presumption that continued foster care is in the best interests of the child." (*Ibid.*)

B

In support of her petition, Z. claimed circumstances had changed after the court terminated reunification services because she had participated in the KIVA drug program and drug court. She further claimed she had achieved sobriety, was working with a sponsor, and regularly visited with the minors. Admittedly, Z. had made progress with services and achieved about 250 days of sobriety by the time of the section 388 hearing. However, throughout the reunification period, Z. did not consistently participate in services or remain drug free. In addition, Z. was barely out of her drug program and had yet to live on her own for a significant period of time while maintaining her sobriety. During her second day of testimony, the court noted Z. exhibited behaviors consistent with drug use. These factors, coupled with her history of drug use and prior unsuccessful attempts at rehabilitation and reunification services, showed her circumstances were merely "changing." Further, although Z. had secured employment, there was evidence showing she was not ready and able to care for and protect the minors. Z. planned to place the minors in daycare while she worked but she did not know which daycare program was available to the minors or how much child care would cost. A petition that alleges merely changing circumstances does not promote stability for the minor or the

minor's best interests because it would mean delaying the selection of a permanent home to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Even had Z. shown changed circumstances, she did not show returning the minors to her custody was in their best interests. After termination of reunification services, the focus of dependency proceedings is to provide the child with permanency and stability. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254-256; *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) The problems that led to the dependency were serious. Z. had abused drugs for many years and during her pregnancies. She suffered a drug relapse, and had left three-year-old Angel alone at night and unattended. Even though at one point the minors were placed in her care, she experienced difficulty caring for them and became overwhelmed with the responsibilities of parenthood. She returned the minors to Agency and became noncompliant with SARMS. Z. was asked to move out of sober living and drug paraphernalia was found in her room. Although Z. had appropriate visits with the minors, their relationship did not outweigh the stable relationship the minors had with the caregivers. Z. argues she was bonded with the minors but she had bonding issues with Andrew during the dependency and testified at the section 388 hearing that she didn't know if the bonding issues with Andrew still existed. Andrew had been a dependent his entire life and Angel for more than two and one-half years. The social worker believed it was not in the minors' best interests to postpone implementing a

permanent plan for adoption. The court acted within its discretion by denying Z.'s section 388 modification petition.

II

Z. challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating her parental rights. She asserts she maintained regular visitation and contact with the minors who would benefit from continuing the parent-child relationship. E. joins in Z.'s argument as it relates to Angel.

A

We review the court's finding the beneficial relationship exception does not apply under the substantial evidence standard. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.) Rather, we "accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*Id.* at p. 53.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

"Adoption, where possible, is the permanent plan preferred by the Legislature."
(*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of six specified exceptions. (§ 366.26, subd. (c)(1)(A)-(F); see also *In re Erik P.* (2002) 104 Cal.App.4th 395, 401; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

Section 366.26, subdivision (c)(1)(A) is an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although day-to-day contact is not required, it is typical in a parent-child relationship. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

Here, E. had been in prison for most of the dependency. He did not have regular contact with Angel or participate in his case plan. Concerning Z., although Z. regularly visited the minors, she did not show the relationship she had with the minors was sufficiently beneficial to outweigh the benefits of adoption. During visits, Z. played with the minors, brought them food, fed them and changed their diapers. The minors were happy to see her and sometimes displayed signs of affection. The minors did not, however, show signs of distress when the visits ended. They instead were happy to see their foster mother and willingly went home with her. The social worker observed Andrew reaching for his foster mother at the end of visits and on occasion, he only wanted to be held by her. In the social worker's opinion, the minors did not have an

attachment to Z. that would outweigh the benefit of adoption. The court was entitled to find the social worker's opinion credible and give great weight to his assessment. We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53; cf. *In re Amber M.* (2002) 103 Cal.App.4th 681.)

The evidence did not show terminating Z. and E.'s parental rights would likely cause the minors great harm and deprive them of a substantial, positive emotional attachment. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Any possible benefit to the minors of continuing a relationship with Z. and E. was outweighed by the benefits of adoption. Where, as here, the biological parent does not fulfill the parental role, "the child should be given every opportunity to bond with an individual who will assume the role of a parent. . . . To hold otherwise would deprive children of the protection that the Legislature seeks to provide." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) Substantial evidence supports the court's finding that the beneficial parent-child relationship did not apply to preclude terminating parental rights.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.